Supreme Court, U.S.
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No. 00-560

IN THE

Supreme Court of the United States

KOREAN AIR LINES CO., LTD.,

Petitioner,

v.

BRANDI WALLACE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

FRANK H. GRANITO, III*
SPEISER, KRAUSE, NOLAN & GRANITO
Attorneys for Respondent
140 East 45th Street, 34th Floor
New York, New York 10017
(212) 661-0011

* *Counsel of Record*

Of Counsel:

FRANK H. GRANITO, JR.
JOHN J. HALLORAN, JR.

164528

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Can a passenger's sexual assault of another passenger in an adjacent seat on board the aircraft constitute an "accident" within the meaning of Article 17 of the Warsaw Convention despite the absence of a causal role on the part of the air carrier?

Respondent Brandi Wallace respectfully requests that the petition for a writ of certiorari filed in this case on behalf of Korean Air Lines Co., Ltd. (KAL) be denied. By letter dated November 21, 2000, the Clerk of this Court (Hon. William K. Suter), requested that a response to the Petition be filed by Respondent.[1]

STATEMENT OF THE CASE

Proceedings Below

Respondent Brandi Wallace was the victim of a sexual assault, committed by a co-passenger, while on board KAL Flight 61 on August 17, 1997. Under Article 17 of the Warsaw Convention, KAL is

> liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[2]

Liability of the carrier arises for an "accident," which is defined as an injury "caused by an unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985).

The District Court for the Southern District of New York dismissed Respondent's claim on the ground that the assault did not constitute an "accident" within the meaning of Article 17 of the Warsaw Convention. Specifically, the District Court

1. Citation to the Petition for Writ of Certiorari will be to "Pet." and citation to the appendices to the Petition will be to Pet. App."

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, October 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note.

concluded that the injury-causing event in this case was not an "accident" because there "was no act or omission by the aircraft or airline personnel representing a departure from the normal, expected operation of flight," and because the injury-causing event was not "a risk characteristic of air travel or related to the operation of the airplane." Pet. App. 21a-27a.

The Court of Appeals for the Second Circuit reversed. The two-judge majority of the Court below defined "accident" in a manner different from this Court in *Saks* and ruled that no "accident" within the meaning of Article 17 occurs unless the injury-causing event is a "characteristic risk of air travel." Pet. App. 11a-12a. Applying this new definition, and hypothesizing the circumstances surrounding the assault, the majority found that an "accident" occurred within the meaning of Article 17.

Circuit Judge Rosemary Pooler concurred in the result below in a separate opinion. Pet. App. 14a-16a. Judge Pooler correctly observed that the reasoning of the majority was predicated on "a factual issue neither briefed nor argued by counsel." Pet. App. 14a. Respondent did not argue below that the "accident" was caused by a "characteristic risk of air travel" and indeed, correctly asserted that such a limitation on the definition of "accident" was beyond this Court's definition of "accident" in *Saks*. Judge Pooler concluded, as Respondent had argued below, that "[a] co-passenger's tort satisfies the Supreme Court's interpretation of 'accident' as 'an unexpected or unusual event or happening that is external to the passenger,' and the Court did not also include a 'characteristic of air travel' requirement in the definition." Pet. App. 15a.

REASONS FOR DENYING THE WRIT

KAL's principal argument is that this Court should grant the petition because the decision of the court below "conflicts with the decision of the Court of Appeals for the First Circuit in *Langadinos v. American Airlines, Inc.*, 199 F.3d 68 (1st Cir. 2000)." Petition at 9. In that case, the First Circuit ruled that no "accident" within the meaning of Article 17 occurs unless "airline personnel play [a] causal role in the commission of the tort." *Id.* 199 F.3d at 70-71.

There is some degree of conflict among the Courts that have addressed the issue of "accident" in the aftermath of this Court's decision in *Saks*. This Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger" (*Saks*, 470 U.S. at 405), and Judge Pooler, in her concurring opinion below, faithfully adhered to that definition and found an "accident" within the meaning of Article 17. The First Circuit, and the two-judge majority below, have engrafted new limitations on this Court's definition in *Saks*, by finding an accident only where "airline personnel play [a] causal role in the commission of the tort" (*Langadinos*, 199 F.3d at 70-71), or where the injury was caused by a "characteristic of air travel." Pet. App. 12a.

Against this backdrop, there does not appear to be a direct conflict between the two-judge majority below and the decision of the First Circuit. Both courts would limit recovery to cases in which the airline personnel, or the circumstances of air travel, contributed to the injury. If a conflict exists, it is between the two-judge majority below and the First Circuit, on the one hand, and this Court's decision in *Saks*, on the other hand. The two-judge majority below and the First Circuit have effectively modified the *Saks* definition of "accident." KAL would have this Court revisit and revise its definition of "accident" in *Saks* and adopt new limitations on recovery in a manner similar to that of the First Circuit and the two-judge majority below. This Court should decline that invitation.

Even assuming that KAL has identified a conflict among the Circuits on a question of treaty interpretation, this case may not be an appropriate vehicle for consideration of the issue presented by KAL on its petition.

First, as acknowledged by Petitioner, the Panel's opinion made a series of factual "assumptions" that were not supported by the record. Petition at 6 & n.4. In fact, the opinion of the Panel failed to appreciate that Respondent was not arguing that KAL acted without due care, or that the acts or omissions of KAL caused the accident. This Court should hesitate before agreeing to hear this case because the "factual findings" of the Court of Appeals were not based on the record.

Second, the issue as framed by Petitioner is very narrow. Petitioner asks this Court to grant review to decide whether "a passenger's sexual assault of another passenger in an adjacent seat on board the aircraft constitute[s] an 'accident' within the meaning of Article 17 of the Warsaw Convention despite the absence of a causal role on the part of the air carrier." Petition at i. Sexual assaults of this type are hardly common, and Judge McLaughlin characterized the circumstances of this case as "unique." Pet. App. at 12a. There does not appear to be any compelling reason for this Court to become embroiled in a fact-intensive inquiry that may well be "unique."

CONCLUSION

The Respondent believes that the outcome below was correct. She commenced this action to seek recovery for an "accident" that caused her personal injury and great anguish. The Panel allowed Respondent to proceed on her claim and, insofar as the outcome alone is concerned, the Panel arrived at the correct result. That result should not be disturbed. While there appears to be some degree of conflict among the Circuits concerning the scope and applicability of this Court's definition of "accident," there appear to be reasons that may render this case an inappropriate vehicle for resolving that conflict. Accordingly, the Petition should be denied.

Respectfully submitted,

FRANK H. GRANITO, III*
SPEISER, KRAUSE, NOLAN & GRANITO
Attorneys for Respondent
140 East 45th Street, 34th Floor
New York, New York 10017
(212) 661-0011

* *Counsel of Record*

Of Counsel:

FRANK H. GRANITO, JR.
JOHN J. HALLORAN, JR.